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## JESSICA LEE SU ENG & ORS v. LILY HO WEI LING & ORS

HIGH COURT SABAH AND SARAWAK, KUCHING
LEONARD DAVID SHIM J
[SUIT NO: KCH-22NCvC-8-3-2021 (HC 4)]
21 MARCH 2025

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**Abstract** – *(i) A testator that signs a will and understands the contents of it and is proven to be of sound mind with no evidence, medical or otherwise, to show that he is suffering from insanity or mental disorder, is proof that the testator has the testamentary capacity to make and execute a will. In the absence of any credible evidence to prove otherwise, the will is rendered authentic and credible; (ii) If a testator signs the will in the presence of two witnesses, they need not actually see the signature. Seeing the testator in the act of signing the will would suffice. It is also not necessary that the testator actually see the witnesses sign. It is sufficient that the testator knows they are signing or could have seen them signing; (iii) In seeking to challenge the preparation of the will and impugn the decision to grant the letter of probate, Amanah Raya Berhad as an interested party ought to be made a party to the action. The court cannot make declarations sought which concerned persons interested, ie, Amanah Raya but the latter is not joined as parties.*

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***CIVIL PROCEDURE:*** *Declarations – Wills and probate – Seeking declaration that will and letter of probate invalid, null and void – Whether court has original and concurrent jurisdiction with probate officer to grant or revoke grant of probate – Whether Amanah Raya interested party and ought to be made party to action – Whether letter of probate valid – Whether declarations could be made concerning parties affected but not joined as party before court – Specific Reliefs Act 1950, s. 42*

F

***SUCCESSION:*** *Will – Validity – Whether will prepared upon instructions of testator – Whether testator had testamentary capacity in making and execution of will – Whether there were suspicious circumstances surrounding execution of will – Whether there was presence of two witnesses – Whether will last will of testator – Whether s. 9(d) of Wills Act 1837 (UK) satisfied*

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***SUCCESSION:*** *Probate – Letter of probate – Grant of – Whether court has original and concurrent jurisdiction with probate officer to grant or revoke grant of probate – Whether Amanah Raya an interested party and ought to be made party to action – Whether letter of probate valid – Specific Reliefs Act 1950, s. 42*

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This was an action by the plaintiffs for, *inter alia*, a declaration that the will dated 10 August 2020 ('2020 will') prepared by Amanah Raya Berhad ('Amanah Raya') was invalid, null and void and that the letter of probate granted by Amanah Raya dated 23 October 2020 in its capacity as probate officer (letter of probate) was invalid, null and void and be set aside forthwith. The first plaintiff was the daughter-in-law of the late Ho Chum Fong ('testator') and was married to the testator's son, the late Matthew Ho Wei Kit ('Matthew'). The second and third plaintiffs were the daughters of the first plaintiff and Matthew. The eighth defendant was the wife of the deceased and the first to seventh defendants were their children. In 2018, the testator had told the first plaintiff that he had executed a last will. Sometime in 2019, the testator had an accident which curtailed his mobility and his health declined. By early August 2020, the testator was a weak and frail man. The testator had to be propped up from the sofa bed in order for him to execute the impugned 2020 will and passed away four days after he signed it. The second defendant had informed the first plaintiff that the testator had executed the 2020 will and that the first to third defendants had been appointed as joint executors of the 2020 will. Sometime in October 2020, the first plaintiff discovered that the testator had executed a will on 4 September 2007 ('2007 will') in a locked cabinet in the room where the testator used to occupy. The plaintiffs discovered that the 2020 will was not the same when compared with the 2007 will. This aroused the plaintiffs' suspicion that the 2020 will was prepared hastily and it did not reflect the true intention of the testator. The plaintiffs commenced this action to challenge the validity of the 2020 will and, at the same time, to propound the 2007 will. The plaintiffs thus sought, *inter alia*, a declaration that the 2020 will was invalid, null and void; and (ii) a declaration that the letter of probate granted by Amanah Raya was invalid, null and void and be set aside. The issues that arose were: (i) whether the 2020 will was prepared upon the instructions of the testator; (ii) whether the testator had testamentary capacity in the making and execution of the 2020 will; (iii) whether there were suspicious circumstances surrounding the making and execution of the 2020 will; and (iv) whether the testator executed the 2020 will or acknowledged his signature to the 2020 will in the joint presence of two witnesses.

**Held (dismissing plaintiffs' claim):**

**(1)** The court has no original and concurrent jurisdiction with the probate officer to grant or revoke a grant of probate. The person clothed with power to do so is the probate officer. However, the exercise of the power by the probate officer can be challenged in court by way of judicial review or by way of a writ action against the probate officer seeking a declaration regarding the correctness of the decision. In the premises, even if the plaintiffs could prove that the decision of Amanah Raya to issue a letter of probate was incorrect, the court could not set aside or

revoke the grant of probate as it had no original or concurrent jurisdiction to do so. Thus, the prayer or relief for the letter of probate to be set aside or revoked could not be allowed by this court. (paras 27 & 28)

**(2)** The preparation of the 2020 will and the grant of probate was carried out by Amanah Raya on the instructions of the deceased testator. As the plaintiffs were seeking to challenge the preparation of the 2020 will by an officer of Amanah Raya and impugn the decision of Amanah Raya to grant the letter of probate, it followed that Amanah Raya was an interested party who may be affected by the declaratory order sought and was not made a party to this action. Thus, all the parties who were affected by the declarations sought were not before the court. As such, Amanah Raya could not engage advocates, file pleadings, call witnesses and make submissions to defend its actions and legal position against the serious allegations and challenges by the plaintiffs. If such declarations were granted, it would not only be in contravention of s. 42 of the Specific Relief Act 1950 but it would also be against the rules of natural justice. This court would not make the declarations sought by the plaintiffs which concerned parties interested *ie*, Amanah Raya but not joined as parties. (paras 36 & 37)

**(3)** DW3, an independent witness that had no personal interest in the estate of the testator, admitted that he knew the testator wanted to make a will and had informed the officer, Mdm Rabiah, to ask the testator for further details for the purpose of the making of the 2020 will. DW3, being a probate officer, was satisfied that the 2020 will was prepared in accordance with the instructions of the testator. DW3's evidence that Mdm Rabiah got in touch with the testator concerning the preparation of the 2020 will had not been rebutted by credible evidence. This court, having seen the evidence of DW3 and DW4, who testified that she was given instructions by her late father to go to Amanah Raya to prepare his last will a few months before he passed away, and having the benefit of observing their demeanour as witnesses, found that the evidence of DW3 and DW4 to be credible. The 2020 will was prepared based on the instructions of the testator. (paras 40-43)

**(4)** There was no dispute that the testator signed the 2020 will. No credible evidence was adduced by the plaintiffs to disprove these basic facts. Neither was there any evidence to show that the testator did not understand the contents of the 2020 will. Evidence showed that the testator was conversant in the English language. These background facts leading to the execution of the 2020 will was sufficient to constitute proof of the testator's knowledge and approval of the 2020 will and sufficed to dispel any suspicious circumstances that surrounded the making of the 2020 will. (para 45)

**(5)** The testator made the first will in 2007. His only son predeceased him after the 2007 will was made. By 2020, some of the testator's properties were or could have been developed or disposed of during his lifetime. To update the assets/properties in his estate that was mentioned in the 2007 will and to provide for the well-being of his grandchildren should any of the beneficiaries were to predecease him, the testator decided to make a new will a few months before his death in 2020. The testator instructed DW4 to contact Amanah Raya to prepare the 2020 will. The 2020 will prepared by Amanah Raya contained contingency or substitution clauses providing for the children of his daughters to inherit the share allocated or bequeathed to his daughters in the event that any of them were to predecease the testator. All the plaintiffs and defendants were named as beneficiaries in the 2020 will. The footages showing the execution of the 2020 will in the presence of the witnesses were also captured. In the absence of any credible evidence to prove otherwise, this court accepted the CCTV footage and screenshot showing the execution of the 2020 will as authentic and credible. The suspicious circumstances complained of by the plaintiffs had been sufficiently dispelled. (paras 46-48)

**(6)** There was no evidence, medical or otherwise, to show that the testator was suffering from insanity or mental disorder when he signed the 2020 will on 10 August 2020. A person who is old, frail and weak or in a state of extreme imbecility may still possess sufficient understanding to direct how his property shall be disposed of. The unrebutted evidence of DW4 and the photographs of the testator taken before the 2020 will was signed supported the defendants' contention that the testator could understand the nature and consequences of his actions. The testator had testamentary capacity to make the 2020 will at the time of the execution of the said will. (paras 51-53)

**(7)** The testator signed the 2020 will on 10 August 2020 at the testator's house at Bampflyde Road. DW1 and DW2 were present at the said house at the date and time of the signing of the 2020 will. Photographs showed that DW1 and DW2 had stood in the doorway at the time the testator was signing the will. The signing took place during the time of the COVID-19 pandemic where social distancing was one of the measures implemented to curb the spread of the disease under the Ministry of Health's guidelines or Standard Operating Procedure. DW2 had to distance himself from the testator and the other persons in the testator's bedroom. He did not cease to be in the presence of the testator when he signed the 2020 will. DW2 saw the testator sign the 2020 will which constituted an act of signing. On a balance of probabilities, the testator had signed the 2020 will in the presence of the two witnesses *ie*,

D1 and DW2. It was not necessary that the testator actually see the witnesses sign. It was sufficient that the testator knew they were signing or could have seen them signing. In the premises, s. 9(c) of the Wills Act 1837 (UK) had been sufficiently complied with. (paras 55-62)

**(8)** The plaintiffs failed to prove their case on a balance of probabilities. The plaintiffs failed to show any good cause to revoke the letter of probate. The 2020 will was valid and was the last will of the testator. In the premises, the letter of probate was valid. (para 66)

**Case(s) referred to:**

*Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA* ***(refd)***

*Casson v. Dade (1781) 1 Bro CC 99* ***(refd)***

*Chang Kian Chiang v. Long Kee Piling Works Sdn Bhd [2025] CLJU 255 HC* ***(refd)***

*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC* ***(refd)***

*Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***

*Lim Siok Luan v. Theresa Chin Kim Thye [1998] CLJU 45 [1998] 1 LNS 45 HC* ***(refd)***

*Lunyi Nyala v. Juana Man Ngipa & Ors [2023] CLJU 889; [2023] 1 LNS 889 HC* ***(refd)***

*Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC* ***(refd)***

*Majumder v. Attorney General of Sarawak [1966] CLJU 97; [1966] 1 LNS 97 FC* ***(refd)***

*Ng Poh Hwa v. Ketua Pengarah Kastam & Ors [2018] CLJU 1288; [2018] 1 LNS 1288 HC* ***(refd)***

*Ong Eng Hock & Anor v. Ong Cheng Guan & Anor [2018] 7 CLJ 154 FC* ***(refd)***

*Public Bank Bhd v. Fung Shaw Yiew & Ors And Another Appeal [2024] 2 CLJ 43 CA* ***(refd)***

*Randolph Yap Pow Kong & Anor v. Yvonne Yap Yoke Sum & Ors [2010] CLJU 684; [2010] 1 LNS 684 HC* ***(refd)***

*Smith v. Smith (1866) LR 1 P&D 143* ***(refd)***

*Superintendant Of Lands And Surveys, Miri Division & Anor v. Abdul Samad Mohd Embong & Ors [2023] 6 CLJ 34 CA* ***(refd)***

*Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA* ***(refd)***

*Tob Weng Keong & Anor v. Tob Chee Hoong [2019] 10 CLJ 150* ***(refd)***

*Virginia John & Anor v. Tinggau Agan & Anor (2019) 10 BLR 747* ***(refd)***

*Waytha Moorthy Ponnusamy & Ors v. YB Dato' Seri Dr Ahmad Zahid Hamidi – Timbalan Perdana Menteri/Menteri Dalam Negeri & Ors [2023] 1 CLJ 385* CA ***(refd)***

**Legislation referred to:**

Administration of Estates Ordinance, s. 32

Civil Law Act 1956, s. 3(1)

Federal Constitution, art. 160

Specific Relief Act 1950, s. 42

Wills Act 1837 [UK], s. 9(c)

*For the plaintiff - Stella Maria Chin Phui Lian; M/s Loke, King, Goh & Partners Advocs*
*For the defendant - Arthur Lee; M/s Arthur Lee, Lin & Co, Advocs*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Leonard David Shim J:**

### Introduction

**[1]** This is an action by the plaintiffs for, *inter alia*, a declaration that the will dated 10 August 2020 (the 2020 will) prepared by Amanah Raya Berhad (Amanah Raya) is invalid, null and void and that the letter of probate granted by Amanah Raya dated 23 October 2020 in its capacity as probate officer (letter of probate) is invalid, null and void and be set aside forthwith.

**[2]** The main grounds relied on by the plaintiffs are non-compliance with s. 9 of the Wills Act 1837 (UK) in that the testator did not sign the 2020 will in the presence of two witnesses present at the same time, there are suspicious circumstances surrounding the making of the 2020 will and the testator did not have testamentary capacity to make the 2020 will. Apart from challenging the validity of the 2020 will and the letter of probate, the plaintiffs are also seeking to propound the 2007 will.

**[3]** There were a total of 11 witnesses who attended court to give testimony partly in written form *via* their respective witness statements and *via* oral cross and re-examinations. The written witness statements have been marked as follows:

**For The Plaintiffs**

| No. | Name/Witness Particulars | Witness Statement (Marked as) | Pages in NOP |
|---|---|---|---|
| 1. | Tan Yew Lee (PW1) | WSPW1 | 4 - 18 |
| 2. | Steve Lau Chee Ming (PW2) | WSPW2 | 18 - 38 |
| 3. | Jessica Lee Su Eng (PW3) | WSPW3 | 40 - 56; 61 to 96; 128 - 148 |
| 4. | Wee Hun Been (PW4) | WSPW4 | 58 - 61 |
| 5. | Akash Rosen a/l Ramkalaish (PW5) | WSPW5 & WSPW5(A) (Affidavit) | 97 - 110<br>99 |
| 6. | Grace Gratiana Ho Kah Lei (PW6) | WSPW6 | 111 - 127 |
| 7. | Pauline Lee Su Ling (PW7) | WSPW7 | 148 - 155 |

**For the Defendants**

| No. | Name/Witness Particulars | Witness Statement (Marked as) | Pages in NOP |
|---|---|---|---|
| 1. | Sim Chen Hua (DW1) | WSDW1 | 157 - 194 |
| 2. | Jong Sin Chu (DW2) | WSDW2 | 194 - 211 |
| 3. | Hamzah Bin Mohamad (DW3) | WSDW3 | 213 - 241 |
| 4. | Betty Ho Wei Kiun (DW4) | WSDW4 | 242 - 277 |

**Background Facts**

**[4]** The background facts as narrated by the plaintiffs are as follows:

(i) the first plaintiff is the daughter-in-law of the late Ho Chum Fong (hereinafter referred to as "the deceased") and was married to the deceased's son, the late Matthew Ho Wei Kit (hereinafter referred to as "Matthew"). The second and third plaintiffs are the daughters of the first plaintiff and Matthew. The eighth defendant is the wife of the deceased and the first to seventh defendants are their children. The ninth and tenth defendants are the sons of the first defendant;

(ii) upon the request of the deceased, the first and second plaintiffs returned from Canada in 2018 to stay with the deceased and his wife, namely the eighth defendant, at their house in Bampfylde Road ("the Bampfylde house"). The third plaintiff is working overseas;

(iii) on or about late 2018, while the plaintiff was staying at the Bamfylde House with the deceased, the deceased had told the first plaintiff that he had executed a last will;

(iv) sometime in 2019, the deceased had an accident which curtailed his mobility. The first plaintiff witnessed the deceased's health declining. The deceased was diabetic and he was also suffering from glaucoma, which may lead to retinal tear. By early August 2020, the deceased was a weak and frail man. As the defendants' own witness, DW1 (Ms Sim Chen Hua) pointed out, the deceased had to be propped up from the sofa bed in order for him to execute the impugned last will on 10 August 2020 (hereinafter referred to as "the 2020 will"). The deceased passed away four days after he signed the 2020 will. The deceased was aged 90 when he passed away on 14 August 2020 and his funeral was on 17 August 2020;

(v) a few days after the deceased passed away, following the first plaintiff's inquiries, the second defendant, namely Betty Ho, informed first plaintiff that the deceased had executed the 2020 will and that the first to third defendants had been appointed as the joint executors of the 2020 will. The first plaintiff was curious as to the existence of the 2020 will especially since the deceased had told her in 2018 and also in 2019 that he had executed his last will;

(vi) after the funeral on 17 August 2020, the first plaintiff again inquired with the second defendant about the 2020 will and when it would be read to the family members. The second defendant informed the first plaintiff that the reading of the 2020 will could only be carried out after the letter of probate has been granted. The first plaintiff contends that she was therefore kept in the dark concerning the contents of the 2020 will;

(vii) after finding out that the second defendant was going to pick up the letters of probate from Amanah Raya Berhad's office on 23 October 2020, the first and second plaintiffs insisted on going along with the second defendant. The second defendant collected the letters of probate from the Amanah Raya Berhad's office and then went to the chambers of Messrs Detta Samen & Co Advocates as she required the first plaintiff to execute some documents. The first plaintiff was able to obtain a copy of the 2020 will and the letters of probate from the lawyer from the chambers of Messrs Detta Samen & Co Advocates;

(viii) the first and second plaintiffs were asked to sign letter of consent for the disposal of a piece of land forming part of the deceased's estate at the chambers of Messrs Detta Samen & Co Advocates;

(ix) the plaintiffs contend that the second defendant was not happy that the first plaintiff was in possession of a copy of the 2020 will. Back at Amanah Raya Berhad's office immediately after attending the chambers of Messrs. Detta Samen & Co Advocates, the plaintiffs contend that the second defendant tried to snatch the 2020 will from the first plaintiff. At this point, the first plaintiff quickly sought confirmation from the officer at Amanah Raya Berhad wherein an officer had told them that thefirst plaintiff is allowed to keep a copy of the 2020 will as one of the beneficiaries under the 2020 will. Upon perusing the 2020 will, the first plaintiff discovered that the 2020 will was executed by the deceased on 10 August 2020, four days before his passing on 14 August 2020. The first plaintiff was told by the deceased on a few occasions in 2018 and also repeated it in 2019 that he had executed his last will. It is only a logical assumption that there exists another will (an earlier will), which was the truly intended final will of the deceased and that the 2020 will which was executed 4 days before the deceased passing is questionable;

(x) sometime in late October 2020, the first plaintiff discovered that the deceased had executed a will on 4 September 2007 (hereinafter referred to as "the 2007 will"), The first plaintiff found the 2007 will in a locked cabinet in the room above where the deceased used to occupy. The plaintiffs discovered that the 2020 will is not the same when compared with the 2007 will. This aroused the plaintiffs' suspicion that the 2020 will was prepared hastily and it does not reflect the true intention of the deceased; and

(xi) the plaintiffs commenced this action to challenge the validity of the 2020 will and at the same time, to propound the 2007 will. The following reliefs are what the plaintiffs are seeking from this court namely:

Reliefs sought:

(a) an injunction to restrain and/or prohibit the first, second and third defendants as the executrix and trustees under the 2020 will from further administering the estate of the said deceased according to the 2020 will pending the disposal of this action;

(b) a declaration that the 2020 will is invalid, null and void;

(c) a declaration that the letter of probate granted by the Amanah Raya Berhad dated 23 October 2020 is invalid, null and void and be set aside forthwith;

(d) a declaration that the 2007 will is the last will and testament of the said deceased;

(e) an order that the first, second and third defendants do give a full account to the plaintiffs in respect of the properties of the said deceased, whether *in rem* or *in personam*, landed or otherwise that had been dealt with and/or administered by them acting as the executrix and trustees of the 2020 will and to restore to the estate of the said deceased all monies, assets, landed properties and effects belonging to the said deceased and/or the documents of title in relation thereto; and

(f) an order that general damages and exemplary damages be paid by the first and/or second and/or third defendants to the plaintiffs for procuring and inducing the execution of the 2020 will.

**[5]** The statement of agreed facts is marked D and the issues to be tried is marked E.

**The Applicable Law In Respect Of Wills In Sarawak**

**[6]** The plaintiffs referred to the definition of what constitutes the very word 'law'. Article 160 of the Federal Constitution defines 'law' as to include:

> ... written law, the common law in so far as it is in operation in the Federation or any part thereof.

**[7]** Section 3 of the Interpretation Ordinance 2005 further defines 'common law' as:

> The common law of England applicable to Sarawak by virtue of the Civil Law Act 1956.

**[8]** The said section also defines the meaning of 'written law' which includes:

(i) the Constitution of the State of Sarawak and its subsidiary legislation;

(ii) all ordinances enacted by the Legislature of Sarawak and their subsidiary legislation having legislative effect;

(iii) Acts of Parliament of Malaysia and their subsidiary legislation which are in force in the State; and

(iv) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and orders in Council and their other subsidiary legislation) which are applicable to Sarawak.

**[9]** The effect of these definitions is that both written law and common law are sources of law in Sarawak. The common law would remain as a source of law, unless it has been abrogated, restricted and modified by written law, post-1949.

**[10]** Section 3(1) of the Civil Law Act 1956 provides that:

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:
>
> (ii) ...
>
> (c) In Sarawak, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on 12 December 1949, subject however to sub-section (3)
>
> (ii) -
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

**[11]** The authority on point is the then Supreme Court case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356, where Hashim Yeop Sani CJ (Malaya) delivering the judgment of the court, explained the position as follows at p. 66:

> Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law ...

**[12]** This principle was affirmed by the Federal Court in the case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389, where Abdul Hamid Mohamad FCJ (as he then was) stated:

> Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia.

**[13]** In *Virginia John @ Lim Sok Hia (f) & Anor v. Tinggau Agan (f) & Anor* (2019) 10 BLR 747, the Miri High Court referred to the Wills Act 1959 which applies to Peninsular Malaysia and the Wills Act 1837 [UK] where the grant of probate by the probate office, Miri was challenged on the ground that the testatrix was uneducated and 90 years old when she made the will and would not have understood the contents of the will written in English. The court found that this was a non-issue and was rendered academic because the will had already been propounded and probated.

**[14]** Guided by the principles and cases cited above, it is evident that the Wills Act 1837 [UK] is the governing legislation in respect of wills in Sarawak. This is due to the absence of any written law in Sarawak specifically addressing the law of wills, making the Wills Act 1837 applicable in these circumstances. The Wills Act 1959 (Act 346) applies to the states in Peninsular Malaysia but does not apply to Sarawak.

**[15]** The relevant section pertaining to the validity of the wills in Sarawak is s. 9 of the Wills Act 1837 (United Kingdom, the words which read follows:

> 9 Signing and attestation of wills
>
> (1) No will shall be valid unless:
>
> (a) It is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) It appears that the testator intended by his signature to give effect to the will; and

(c) The signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) Each witness either:

(i) Attests and signs the will; or

(ii) Acknowledges his signature,

In the presence of the testator (but not necessarily in the presence of any other witness),

But no form of attestation shall be necessary.

(2) For the purposes of paragraphs (c) and (d) of subsection (1), in relation to wills made on or after 31 January 2020 and on or before 31 January, "presence" includes presence by means of video conference or other visual transmission.

**[16]** What s. 9 establishes is that unless all the ingredients in s. 9 co-exist at the time of the making of a will, in Sarawak, such a document will be deemed to be an invalid will. These ingredients by the words of s. 9 are as follows:

(i) in writing - it is in writing, and signed by the testator, or by some other person in his presence and by his direction;

(ii) intention - it appears that the testator intended by his signature to give effect to the will;

(iii) testator sign in presence of two or more witnesses:

the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(iv) two or more witnesses signs in presence of testator:

each witness either attests and signs the will; or acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness).

**Evaluation And Findings**

**[17]** The plaintiffs' action and reliefs sought are for, *inter alia*, injunction, declarations and setting aside the 2020 will. It is undisputed that the 2020 will has been propounded and probate has been granted. The action and prayer to set aside the letter of probate is tantamount to a revocation of a grant of probate. In *Ong Eng Hock & Anor v. Ong Cheng Guan & Anor* [2018] 7 CLJ 154, the Federal Court stated that:

(13) ... But probate was not sought in the instant case. The will had been propounded. Probate had been granted. After it had been probated, the will was challenged. But yet, what was before the trial court was not an action for the grant of probate, but an action for revocation of the probate.

A (12) Similarly, in our present case, the plaintiff's action is to revoke the validity of the second will based on the grounds stated above. It is trite that revocation of will may only be made if there is sufficient cause. This is elucidated in section 34 of the Probate and Administration Act 1959 ...

**[18]** However, both parties took the position that the courts in Sarawak has B no jurisdiction to grant or revoke a grant of probate. The power to do so is vested in the probate officer pursuant to s. 32 of the Administration of Estates Ordinance (Cap 80).

**[19]** The plaintiff submitted as follows:

C **The Jurisdiction Of The Court & Revocation Of Probate**

**[20]** As officers of the court and in the administration of justice, the plaintiffs highlighted to this court s. 32 of the Administration of Estates Ordinance (Cap 80) and the case of *Lim Siok Luan v. Theresa Chin Kim Thye* [1998] CLJU 45; [1998] 1 LNS 45, wherein the court held that:

D Clearly then, the provisions of the Ordinance which I have referred to do not confer any jurisdiction on the court to issue any grant of probate or letters of administration. The person clothed with power to do so is now only the Probate Officer (*Ong Ka Kim v. Wong Sing Kiong & Ors* [1997] 5 MLJ 46) ever since the removal of the Registrar of the Supreme Court E from exercising such power after the said amendment. The Probate Officer is clothed with power under the Ordinance to decide to whom the grant of probate or letters of administration should be issued to but the exercise of this power can be challenged in a court of law by way of judicial review (*Foo Sam Tek v. Probate Officer, Simanggang* [1960-63] SCR 17) or even by way of a writ action seeking a declaration regarding the F correctness of the decision (*Teh Guan Teik (SJN 7847) v. Inspector-General of Police & Anor* [1998] 3 AMR 2141 FC).

**[21]** This was followed by the learned High Court Judge in the case of *Lunyi Nyala v. Juana Man Ngipa & Ors* [2023] CLJU 889; [2023] 1 LNS 889, wherein the learned judge explained that:

G [13] There are series of cases where the court decided that in the State of Sarawak and by the provisions of the Administration of Estate Ordinance (Cap. 80), the jurisdiction and power to grant Probate and Letters of administration vested in the Probate Officer. The Courts in the State of Sarawak has no original and concurrent jurisdiction with the Probate Officer to grant or revoke a Probate or Letters of A dministration. H

[14] If the plaintiff is not satisfied with the grant of the Letters of Administration to the first defendant, she should first apply to the Probate Officer to cancel or revoke the same and if the Probate Officer refused to do so and if there were good grounds, it is for the plaintiff to challenge such decision of the Probate Officer by Judicial Review proceedings for I certiorari or mandamus as the case may be, to quash such decision of the Probate Officer or by a writ action seeking a declaration regarding the correctness of such decision of the Probate Officer.

**[22]** The plaintiffs aver that a good cause has been established compelling the probate officer to revoke the grant of probate based on the totality of evidence.

**[23]** Section 32 of the Administration of Estate Ordinance (Sarawak Cap 80) provides that the probate officer has the sole discretion to revoke his grant of probate at any time upon good cause being shown.

**[24]** To put it simply, a party may, at any time, impeach the grant of probate must present compelling reasons to the probate officer for the revocation.

**[25]** In the present matter, the plaintiffs contend that they have successfully established that the mandatory requirement for a will to be valid was not adhered to. DW2 testified that he did not witness the signing of the purported 2020 will by the deceased on 10 August 2020. This alone, non-compliance of the Wills Act 1837, is serious and fatal, which rendered the Purported 2020 will nugatory and invalid. That said, the court should find it affirmative that a good cause has been established to revoke the grant of probate.

**[26]** The defendants submitted as follows:

11. **Jurisdictional Powers Of The Court**

(a) *Section 32 of the Administration of Estate Ordinance (Sarawak Cap 80)* provides that:

> *32. (1) A Probate Officer may revoke his grant of probate or letters of administration at any time upon good cause being shown.*
>
> *(2) Notice of revocation shall be posted outside the office of the Probate Officer and shall be inserted in the Gazette.*

(b) In the State of Sarawak, the applicable law is the Administration of Estate Ordinance (Sarawak Cap 80). The Ordinance vests the jurisdiction and power to grant probate and letters of administration to the Probate Officer. *The courts in the State of Sarawak has no original and concurrent jurisdiction with the Probate Officer to grant or revoke a probate or letters of administration.*

See also: *Ong Ka Kim v. Wong Sing Kiong & Ors [1997] 2 MLRH 170; [1997] 5 MLJ 46; Lim Siok Luan v. Theresa Chin Kim Thye [1998] 7 MLRH 215; Chieng Soh Geok & ors v. Chieng Sing Huat [1999] 2 MLRH 874; [1999] 4 MLJ 526; [1999] 7 CLJ 135; [1999] 4 AMR 4680; Rafeah Binti Baker v. Wahi Bin Midin [2020] MLRHU1905 and Vivien Teo Lian Eng v. Ang Leng Tat [1977] 1 MLRA 172; [1978] 1 MLJ 102, CA (Brunei)*

*(c) Section 6 of the Administration of Estate Ordinance (Sarawak Cap 80)* provides that:

> *6. A grant of Probate shall not be issued unless:*
>
> *(a) the original will or, if the will has already been proved in a foreign country, a true copy thereof, certified by the foreign authority, has been deposited with the Probate Officer;*

A *(b) the Probate Officer is satisfied that the will was duly executed by the testator in the manner required by law."*

*(d) Section 11 of the Administration of Estate Ordinance (Sarawak Cap 80)* provides that:

B 11. An application for probate or letters of administration shall be made in person to the Probate Officer.

(e) In the current circumstances, the defendants contend that it is clear that the plaintiff has not shown good cause so as to compel the Probate Officer to revoke his grant of probate.

C (a) In light of the authorities discussed above, the position in law on testamentary capacity is clear: *if the testator is ill, it does not deprive his ability or capacity to execute it*. There must be clear evidence to depict on insane delusion existing in the testator's mind at the time of making of the will. Essentially, it is sufficient for the testator, at the time the will is executed to have sufficient mental ability to D understand he is making a will, the effect of making the will, and the general nature and extent of his property. The duty of the court is to give effect to the will of the testator and not deprive him of the right to select the beneficiaries based on his wish.

E (b) In the premises, the defendants submit that *on the balance of probabilities*, the last will (*ie*, the will executed in 2020) is valid and the first, second and the third defendants are empowered by the law to act as the Joint executrixes and Trustees under the aforementioned last will.

(emphasis added)

F **[27]** The above authorities show that the court has no original and concurrent jurisdiction with the probate officer to grant or revoke a grant of probate. The person clothed with power to do so is the probate officer. However, the exercise of the power by the probate officer can be challenged in court by way of judicial review or by way of a writ action against the probate officer seeking a declaration regarding the correctness of the G decision.

**[28]** In the premises, even if the plaintiffs could prove that the decision of Amanah Raya to issue letter of probate is incorrect, the court in Sarawak could not set aside or revoke the grant of probate as it has no original or concurrent jurisdiction to do so. Thus, the prayer or relief for the letter of H probate to be set aside or revoked could not be allowed by this court. See *Ong Ka Kim* and *Lim Siok Luan* above.

**[29]** Learned counsel for the defendants took the position from the very beginning of this trial that the plaintiffs could have challenged the decision of Amanah Raya to grant the letter of probate by way of judicial review but I

they failed to do so. It is clear that the plaintiffs opted to challenge the decision of the Amanah Raya to grant the letter of probate by seeking a declaration that the letter of probate is invalid, null and void.

**[30]** It is undisputed that Amanah Raya who prepared the 2020 will and granted the letter of probate is not joined as a party to this action. The power to grant a probate is vested and rests with the probate officer and Amanah Raya acting in its capacity as probate officer. In *Ng Poh Hwa v. Ketua Pengarah Kastam & Ors* [2018] CLJU 1288; [2018] 1 LNS 1288, the High court, Azizah Hj Nawawi J (as Her Ladyship then was) held:

> [31] Be that as it may, the applicant is now challenging the decision of the respondents maintaining its earlier decision to bar the applicant from travelling overseas. However, the very authority who issued the order to bar the applicant from travelling overseas, the Director General of Immigration has not been made a party. The powers to bar a person from travelling overseas rests with the Director General of Immigration, not the respondent. Therefore, on this ground alone, both the application for an order of certiorari and declaration cannot be granted.

**[31]** In *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551, the Court of Appeal held:

> [1] In cases where a declaration is sought for, except in very exceptional circumstances, all persons interested should be made parties, whether by representation or otherwise. No such special circumstances exist in the instant case. The failure to add Thomas as a codefendant to the main action and the failure to add Tunas Murni as a respondent to the appeal were serious impediments that stood in the way of the appellant's success before this court. Clearly, the success or failure of the appellant's case depends very much upon whether he can make out the case alleged against Thomas. The non-joinder of Thomas must therefore be fatal to the action.

**[32]** In *Majumder v. Attorney General of Sarawak* [1966] CLJU 97; [1966] 1 LNS 97, the Federal Court held:

> It seems to me that these grounds are incontestable. The courts should not make declarations which concern persons interested but not joined as parties (*London Passenger Transport Board v. Moscrop* (1942) AC 332 and *Threw v. Attorney General* (1936) 2 All ER 1325).

**[33]** In *Waytha Moorthy Ponnusamy & Ors v. YB Dato' Seri Dr Ahmad Zahid Hamidi –Timbalan Perdana Menteri/Menteri Dalam Negeri & Ors* [2023] 1 CLJ 385, the Court of Appeal held:

> [42] It is apposite to emphasize that the general rule is that declarations will not be granted unless all parties who will be affected by such declarations are before the court. In *Sekar Kandasamy v. Lembaga Wakaf Hindu Pulau Pinang & Ors* [2022] 1 LNS 2111; [2022] MLJU 2197; [2022]

7 AMR 425; [2022] AMEJ 1326 (CA) this court had occasion to deal with a somewhat similar situation where declaratory orders were being sought pursuant to an originating summons, the effect of which was that the decision of the Head of State of Pulau Pinang (Tuan Yang Terutama - "TYT") would be impugned. However, the Penang State Government which represents the TYT was not named as a party to the originating summons. The decision of this court touching upon this point reads as follows:

> [15] It is clear from the prayers sought in OS13 that the plaintiff is seeking to impugn the deregistration of the Society by the Third respondent and the TYT's decision *vis-à-vis* the takeover of the Temple by the First respondent. In pith and substance, the prayers sought in OS13 are targeted at the validity of the deregistration of the Society via the Third respondent's decision dated 7 August 2019, and the First respondent's takeover of the administration and management of the Temple per the TYT's decision dated 19 December 2019.
>
> [16] In so far as the latter decision is concerned, the decision maker, *ie*, the TYT is not before the court. The JC opined that the State Government of Penang ought to have been named as a party, as the TYT acts under the advice of the State Executive Council, *ie*, Governor in Council - (s. 4 of the 1906 Ordinance). We agree with the JC's ruling in this regard. It is trite that declarations may not be made against parties who are not before the court. As it stands, the prayers sought in the OS *vis-à-vis* the decision of the TYT offend the principle that was established by the House of Lords in the seminal case of *London Passenger Transport Board v. Moscrop* [1942] AC 332; [1942] 1 All ER 97 HL ("Moscrop") (per Viscount Maugham) that declarations ought not to be granted against parties who are not before the court and who may be affected by the orders.
>
> [17] In *Majumder v. Attorney-General of Sarawak* [1967] 1 MLJ 101 (FC) the Federal Court referred to *Moscrop* and said that "The courts should not make declarations which concern persons interested but not joined as parties.". Hence, since the TYT is not named as a party to OS13, the decision of the TYT cannot be impugned.

[50] Even if we accept (without concluding) that the plaintiffs may have a leg to stand on to prosecute the AOS, we think that it would be wrong in the circumstances for the High Court to grant the declaratory reliefs sought by the plaintiffs against a party who is not before the High Court to defend himself against the serious allegations made against him.

[51] Therefore, upon such failure to name Dr Zakir Naik as a party to the AOS, we find the plaintiffs' claims are on the face of it 'obviously unsustainable' and should be struck out. We are also of the view that the plaintiffs ought to have commenced judicial review under O. 53 of the

ROC 2012 instead of filing the AOS as the reliefs sought are essentially an indirect effort at impugning the decision of the relevant public authority to grant PR status to Dr Zakir Naik. This is essentially a matter of public law and not private law. See: *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors* (2010) 5 CLJ 865 (FC).

**[34]** In *Superintendant Of Lands And Surveys, Miri Division & Anor v. Abdul Samad Mohd Embong & Ors* [2023] 6 CLJ 34, the Court of Appeal held:

[39] In *Majumder v. Attorney-General Of Sarawak* [1966] 1 LNS 97; [1967] 1 MLJ 101, the Federal Court held that declaration should not be made concerning persons interested but not joined as parties, as the declaration sought affected the rights of concerned parties, who are not before the court: The Courts should not make declarations which concern persons interested but not joined as parties (*London Passenger Transport Board v. Moscrop* [1942] AC 332 and *Threw v. Attorney General* [1936] 2 All ER 1325).

[40] The same principle was applied by this court in *Sekar Kandasamy v. Lembaga Wakaf Hindu Pulau Pinang & Ors* [2022] 1 LNS 2111; [2022] MLJU 2197; [2022] 7 AMR 425; [2022] AMEJ 1326 where declaratory orders were being sought pursuant to an originating summons, the effect of which was that the decision of the Head of State of Pulau Pinang (Tuan Yang Terutama - "TYT") would be impugned. However, the Penang State Government which represents the TYT was not named as a party to the originating summons. The court held as follows:

> [15] It is clear from the prayers sought in OS13 that the plaintiff is seeking to impugn the deregistration of the Society by the Third respondent and the TYT's decision *vis-à-vis* the takeover of the Temple by the First respondent. In pith and substance, the prayers sought in OS13 are targeted at the validity of the deregistration of the Society *via* the Third respondent's decision dated 7 August 2019, and the First respondent's takeover of the administration and management of the Temple per the TYT's decision dated 19 December 2019.
>
> [16] In so far as the latter decision is concerned, the decision maker, *ie*, the TYT is not before the court. The JC opined that the State Government of Penang ought to have been named as a party, as the TYT acts under the advice of the State Executive Council ie, Governor in Council - (s. 4 of the 1906 Ordinance). We agree with the JC's ruling in this regard. It is trite that declarations may not be made against parties who are not before the court. As it stands, the prayers sought in the OS *vis-à-vis* the decision of the TYT offend the principle that was established by the House of Lords in the seminal case of *London Passenger Transport Board v. Moscrop* [1942] AC 332; [1942] 1 All ER 97 HL ("*Moscrop*") (per Viscount Maugham) that declarations ought not to be granted against parties who are not before the court and who may be affected by the order ...
>
> (emphasis added)

**[35]** In *Chang Kian Chiang v. Long Kee Piling Works Sdn Bhd* [2025] CLJU 255, the High Court held:

> [47] Another pertinent issue is that section 42 of the Specific Reliefs Act 1950 only binds parties to the present OS which means either P or D. Apart from P, other former directors as identified earlier were neither parties in the present OS. Refer to *Majumder v. Attorney General of Sarawak* [1966] CLJU 97; [1966] 1 LNS 97; [1967] 1 MLJ 101 (Privy Council):
>
> > A declaration in the terms sought would therefore not advance the appellant's case. There is a further objection to the granting of this declaration that, in the terms of cl. 1, a "designated officer" means an officer designated as such by the Secretary of State. The Secretary of State is not a party to these proceedings and moreover it is entirely within his discretion as to whether he designates an officer as such or not. He would not be compelled to do so. Their Lordships therefore conclude that the Federal Court were right in dismissing the appellant's appeal on this declaration.
>
> [48] Refer also to *K Ramalingam Krishnamoorthy & Ors v. Subramaniam Sathasivam & Ors* [2017] CLJU 342; [2017] 1 LNS 342; [2017] 8 MLJ 36 (High Court):
>
> > As provided in s. 42 of the Specific Relief Act 1950, a declaration made under that Chapter is binding only on the parties to the suit. In my opinion, the process of this court should not be abused by the plaintiffs to obtain declarations on the MIC when the plaintiffs now have nothing to do with the said party.
>
> [49] Thus, should such declaratory relief be granted, not only would it be in contravention of Section 42 Specific Reliefs Act 1950 but it would also be against the rules of natural justice where the former directors not named in the present OS or their legally appointed representatives (in the case of TPC who has since deceased) will be denied of their right to be heard before this court. Refer to *Macfoy v. United Africa Co Ltd* [1961] All ER 1169 (Privy Council) page 1172:
>
> > If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad.

**[36]** In the present case, it is undisputed that the preparation of the 2020 will and the grant of probate was carried out by Amanah Raya. PW3, the probate officer from Amanah Raya Berhad explained that the 2020 will was prepared by an officer of Amanah Raya Berhad, Puan Rabiah on the instructions of the testator. The plaintiffs strongly disputes PW3's evidence and contends that the 2020 will prepared by Amanah Raya was not prepared upon the instructions of the testator/deceased. As the plaintiffs are seeking

to challenge the preparation of the 2020 will by Puan Rabiah/Amanah Raya and impugn the decision of Amanah Raya to grant the letter of probate, it follows that Amanah Raya is an interested party who may be affected by the declaratory order sought and is not made a party to this action.

**[37]** Although the probate officer, PW3 was called by the defendants as a witness, Amanah Raya is not joined as a party. Thus, all the parties who are affected by the declarations sought are not before the court. As such, Amanah Raya could not engage advocates, file pleadings, call witnesses and make submissions to defend its actions and legal position against the serious allegations and challenge by the plaintiffs. If such declarations are granted, it would not only be in contravention of s. 42 of the Specific Relief Act 1950 but it would also be against the rules of natural justice. Guided by the aforesaid authorities, the court would not make the declarations sought by the plaintiffs which concern persons interested, *ie*, Amanah Raya but not joined as parties.The above findings would suffice to dispose of the claim by the plaintiffs.

**[38]** In the interest of justice and in case I have erred in my findings above, the court will next consider the issues to be tried. There are two sets of issues to be tried comprising of ten common issues and three plaintiffs' issues to be tried. After perusing the pleadings and submissions, the main issues for trial are as follows:

(i) whether the 2020 will was prepared upon the instructions of the testator/deceased;

(ii) whether the testator had testamentary capacity in the making and execution of the 2020 will;

(iii) whether there were suspicious circumstances surrounding the making and execution of the 2020 will; and

(iv) whether the testator executed the 2020 will or acknowledged his signature to the 2020 will in the joint presence of two witnesses.

*Issue (I) Whether The 2020 Will Was Prepared Upon The Testator's Instructions.*

**[39]** In summary, the plaintiffs submit that the testator never instructed the Amanah Raya Berhad's officer to prepare the 2020 will. In the event that the testator did instruct DW4 to do so, the plaintiffs contend that DW4 failed to convey the testator's true intentions during the preparation of the 2020 will. The plaintiffs contend that given DW4's role as intermediary liaising with Amanah Raya for the making of the 2020 will and named as beneficiary and co-executrix of the estate of the testator/deceased, this give rise to potential conflict of interest and suspicious circumstances.

**[40]** Regarding issue I, DW3 testified that Amanah Raya's officer in charge, Mdm Rabiah got in touch with Ho Chum Fong concerning the preparation of his last will (see p. 220 lines 12 to 21 of NOP) and Mdm

Rabiah informed him that Ho Chum Fong (deceased) is willing to make a will and asked her (Mdm Rabiah) to draft the will and PW3 asked Mdm Rabiah whether Ho Chum Fong has children or is married. See p. 232 lines 19 to 22 of NOP.

**[41]** DW4 (Betty Ho Wei Kiun) testified that she was given instructions by her late father to go to Amanah Raya to prepare his last will a few months before he passed away. Amanah Raya prepared Ho Chum Fong's last will based on DW4's father's instruction. See p. 257 lines 1 to 24 of NOP.

**[42]** DW4 further testified that Pn Rabiah ever contacted Ho Chum Fong on 10 August 2020 before he signed the will. See p. 259 lines 9 to 17 of NOP. After talking to Ho Chum Fong, Puan Rabiah said to DW4 that the (testator) can sign the will. See p. 260 lines 4 to 7 of NOP. DW4 heard their conversation with Pn Rabiah refreshing him about the content of the will and explaining to him what is written in the will. The testator signed the last will shortly after Pn Rabiah said he can sign the will. See p. 262 lines 6 to 19 of NOP.

**[43]** DW3 is an independent witness and has no personal interest in the estate of the testator/deceased. DW3 is the superior of Puan Rabiah. DW3 admitted that he knew the testator, Mr Ho Chum Fong wanted to make a will and he informed Puan Rabiah to ask Mr Ho whether he had any children and further details for the purpose of the making of the 2020 will. DW3, being the probate officer was satisfied that the 2020 will was prepared in accordance with the testator's instructions. DW3's evidence that Puan Rabiah got in touch with the testator concerning the preparation of the 2020 will has not been rebutted by credible evidence. Having seen and heard the evidence of DW3 and DW4 and having the benefit of observing their demeanour as witnesses, the court finds the evidence of DW3 and DW4 to be credible.The evidence of DW3 and DW4 above shows that the 2020 will was prepared based on the instructions of the testator.

*Issue (III) - Suspicious Circumstances*

**[44]** As regards issue (III), the above facts and evidence shows that the testator wanted to make a new will. The testator instructed DW4/second defendant on the terms of the will. DW4 conveyed the testator's instructions to Amanah Raya's officer in charge, Puan Rabiah and Puan Rabiah drafted the 2020 will. The testator through PW4 called DW1 (Sim Chen Hua) and DW2 (Jong Sin Chu) to witness the execution of the 2020 will. On 10 August 2020, Puan Rabiah spoke with the testator over the phone in English refreshing him about the content of the 2020 will and explaining to him what is written in the will. Shortly after that the testator signed the 2020 will.

**[45]** There is no dispute that the testator signed the 2020 will. No credible evidence was adduced by the plaintiffs to disprove these basic facts. Neither is there any evidence to show that the testator did not understand the contents of the 2020 will.The evidence shows that the testator was conversant in the English language. These background facts leading to the execution of the 2020 will was sufficient to constitute proof of the testator's knowledge and approval of the 2020 will and suffice to dispel any suspicious circumstances that surrounded the making of the 2020 will. In *Tob Weng Keong & Anor v. Tob Chee Hoong* [2019] 10 CLJ 150, the Court of Appeal held:

> (1) In order to dispel suspicious circumstances, the propounder must furnish affirmative proof of the testator's knowledge and approval, which must be strong enough, to satisfy the court in the particular circumstances. The greater the degree of suspicion, the stronger the affirmative proof must be to remove it. The High Court Judge ('HCJ') concluded that the appellants failed to dispel the suspicious circumstances because of the probability that the testator did not understand the contents of the will. The HCJ's surmise was misplaced. The HCJ overlooked the following established facts: (i) the testator wanted to make a will; (ii) the testator instructed the second appellant, in Cantonese, on the terms of the will; (iii) the second appellant conveyed the testator's instructions in English to Ashok; (iv) the testator called Miss Chen to witness the execution of his will; (v) Ashok prepared the will and explained its contents to the second appellant who, in turn, translated them to the testator in Cantonese; and (vi) the testator signed the will. The background facts leading to the execution of the will were sufficient to constitute proof of the testator's knowledge and approval of the will.

**[46]** The body of evidence shows that the testator made the first will in 2007. His only son predeceased him after the 2007 will was made. By 2020, some of the testator's properties were or could have been developed or disposed of during his lifetime. For instance, the testator's shares in the Ho family flagship company, Hung Cheong Jewellery and Watch Sdn Bhd bequeathed in the 2007 will was transferred to the first, second and third plaintiffs. See pp. 312 to 313 of encl. 129 marked C and p. 259 of encl. 128 marked B.

**[47]** To update the assets/properties in his estate that was mentioned in the 2007 will and provide for the well being of his grand children should any of the beneficiaries were to predecease him, the testator decided to make a new will a few months before his death in 2020. The testator instructed DW4 to contact Amanah Raya to prepare the 2020 will. The 2020 will prepared by Amanah Raya contain contingency or substitution clauses providing for the children of his daughters to inherit the share allocated or bequeathed to his daughters in the event that any of them were to predecease the testator. All the plaintiffs and defendants are named as beneficiaries in the 2020 will.

**[48]** The footages showing the execution of the 2020 will in the presence of witnesses was captured on CCTV or screenshot. See pp. 247 to 255 of encl. 128 marked B. It must be pointed out that all the documents in the trial bundles are classified as Part B documents and are agreed as to authenticity. PW5, a digital forensic examiner was called by the plaintiffs to give evidence as an expert witness on his digital forensic report found in pp. 19 to 245 of exh. C. PW5 did not mention or make any finding on the authenticity and accuracy of the said CCTV recording and screenshot shown at pp. 247 to 255 of exh. B. In the absence of any credible evidence to prove otherwise, the court accepts the CCTV footage and screenshot showing the execution of the 2020 will as authentic and credible. In the premises, the court finds that the suspicious circumstances complained of by the plaintiffs have been sufficiently dispelled.

*Issue (II) - Testamentary Capacity*

**[49]** The plaintiffs contend that the testator was 90 years old, frail and weak at the time of the execution of the 2020 will and does not have the testamentary capacity to make the 2020 will. In *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, the Federal Court remarked on the issue of testamentary capacity as follows:

> It is trite law that for a will to be valid, a testator must have testamentary capacity. Whether a testator has testamentary capacity depends on the facts of each case. What is meant by testamentary capacity has been laid down by Chief Justice Cockburn more than a century ago in *Banks v. Goodfellow* [1870] LR 5 QB 549. This case was cited copiously by the Court of Appeal in the instant case. For the sake of emphasis it is appropriate to repeat the sentiments expressed by Cockburn CJ who said *inter alia*: It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; ...

**[50]** In *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90; [2002] 4 MLJ 97, Gopal Sri Ram JCA (as he then was) stated that "very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve

testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator."

**[51]** In the present case, there is no evidence, medical or otherwise to show that the testator was suffering from insanity or mental disorder when he signed the 2020 will on 10 August 2020. A person who is old, frail and weak or in a state of extreme imbecility may still possess sufficient understanding to direct how his property shall be disposed of. See *Gan Yook Chin (P)* above.

**[52]** In *Randolph Yap Pow Kong & Anor v. Yvonne Yap Yoke Sum & Ors* [2010] CLJU 684; [2010] 1 LNS 684, a suit was filed to invalidate the deceased's will on the grounds that the deceased suffered from Parkinson's disease and mild dementia and was exacerbated by hallucinations following an adverse reaction to medication. Despite the testator's mental condition, the High Court, per Ravinthran Paramaguru JC (as His Lordship then was) found that at the date and time of the signing of the will, the testator possess a sound mind and the will was valid.

**[53]** The unrebutted evidence of DW4 at Q&A 6 of WSDW4 and the photographs of the testator taken shortly before the 2020 will was signed (pp. 321 - 325 of encl. 129 marked as bundle C) supports the defendants' contention that the testator could understand the nature and consequences of his actions. From the evidence and guided by the above authorities, the court finds that the testator has the testamentary capacity to make the 2020 will at the time of execution of the said will.

*Issue (IV) - Whether The 2020 Will Was Executed Or Acknowledged In The Presence Of Two Witnesses*

**[54]** The plaintiffs contend that the 2020 will was not executed or acknowledged in the joint presence of two witnesses as required by the will Act 1837 [UK] and the 2020 will is invalid, null and void. It is not disputed that the 2020 will has been propounded and probate has been granted. Thus, the due execution and attestation of the 2020 will is a non-issue. In *Virginia John & Anor v. Tinggau Agan & Anor* [2019] 10 BLR 474, the High Court (per Dean Wayne Daly JC) held: (10) I was with the defence's. Submission on this issue. Indeed, it has been rendered academic. It is no longer in issue because the will had been propounded and probated. The grant of probate was issued on Jun 17, 2015. That being the case, the plaintiffs being persons who seek to revoke the probate have to establish sufficient cause. (See *Ong Eng Hock & Anor v. Ong Cheng Guan & Anor*, *supra*)" Notwitstanding the fact that the 2020 will has been propounded and probated, the issue of proper execution of the 2020 will and its attestation by two witnesses will be considered below.

**[55]** There is no dispute by the parties that the testator signed the 2020 will on 10 August 2020 at the testator's house at Bampfylde Road. There is also no dispute that DW1 and DW2 were present at the Bampfylde house at the date and time of the signing of the 2020 will. The plaintiffs contend that the 2020 will was not signed by the testator in the presence of the said two witnesses as one of the witnesses, DW2 (Jong Sin Chu) gave conflicting evidence in his witness statement and during cross examination.

**[56]** In his witness statement, DW2 stated that he witnessed the signing of the 2020 will from the doorway with DW1 and DW2 saw DW4 passed the deceased a pen and the 2020 will for signing when he stood in the doorway. Under cross-examination, DW2 said he did not see the testator signed the 2020 will. However, the photographs marked as C2 (1-4) shows that DW1 and DW2 stood in the doorway on or about the date and time of the signing of the 2020 will by the testator. The signing took place during the time of COVID-19 pandemic where social distancing was one of the measures implemented to curb the spread of the disease under the Ministry of Health's guildelines or standard operating procedure (SOP).

**[57]** DW2 testified under cross-examination that from the doorway, he saw Betty (DW4) passed a pen and a document to the testator. When the testator started to sign the will, he (DW2) waited at the kitchen table. See p. 205 lines 16 to 21 of NOP. The photographs show that a kitchen table with chairs is situated near to the doorway. When Betty (DW4) went out of the room, every page of the will was signed. See p. 206 lines 1 to 4 of NOP.

**[58]** Due to the requirement of social distancing, DW2 moved from the doorway when the testator started to sign the 2020 will and went to the kitchen table nearby. There is no evidence to show that DW2's view was totally blocked and he could not see the act of signing by the testator from the dining table. Due to the special circumstances caused by the COVID-19 pandemic at the material time, DW2 had to distanced himself from the testator and the other persons in the testator's bedroom. By adhering to the Ministry of Health's COVID-19 guidelines or SOP on social distancing in the circumstances of this case, DW2 did not cease to be in the presence of the testator when he signed the 2020 will. DW2 saw the testator started to sign the 2020 will which constitutes an act of signing. DW2 did not go out of the dining room or house to attend to other matters but waited at a kitchen table near the doorway of the testator's room. If a testator signs the will in the presence of both witnesses, they need not actually see the signature. Seeing the testator in the act of signing the will would suffice. See *Smith v. Smith* (1866) LR 1 P&D 143.

**[59]** There is no dispute that DW1 saw the testator signing the 2020 will from the doorway. On a balance of probabilities and for the foregoing reasons, the court finds that the testator signed the 2020 will in the presence of the two witnesses, *ie*, DW1 and DW2 and s. 9(c) of the Wills Act 1837 has been sufficiently complied with.

**[60]** The plaintiffs further contends that the testator did not see DW1 and DW2 signing the 2020 will at the kitchen table. There is a lack of credible evidence to show that the testator could not or did not see DW1 and DW2 signing the 2020 will from the sofa bed where he lay or other areas in the testator's room. The court could not assume or presume that the testator did not see the two witnesses signing the 2020 will in the absence of any credible evidence.

**[61]** The plaintiffs contend that the testator's line of sight was obstructed by the wall of the testator's room. Without visiting the scene or room where the 2020 will was signed, the court could not make a definitive finding that the testator could not or did not see the two witnesses signing/attesting the 2020 will. The photographs marked C2 (1-4) and p. 322 of bundle C shows that the door of the testator's room was open at the material time and a dining table with chairs is situated near to the doorway which appears to capable of being seen from the inside of the testator's room. Thus, the court finds that the plaintiffs' contention that the testator did not see DW1 and DW2 signing/witnessing the 2020 will is unsubstantiated on a balance of probabilities.

**[62]** Further, it is not necessary that the testator actually see the witnesses sign. It is sufficient that the testator knows they are signing or could have seen them signing. See *Casson v. Dade* (1781) 1 Bro CC 99. In the premises, s. 9(d) of the Wills Act 1837 (UK) has been satisfied.

**[63]** The plaintiffs further contend that under cross-examination, DW3 said there is a physical file containing documents or records pertaining to the 2020 will at the Amanah Raya's office and the defendants did not produce the said file in court. The plaintiffs urged the court to draw an adverse inference against the defendants under s. 114(g) of the Evidence Act 1950 for not producing the physical file in court. The undisputed evidence shows that DW3 agreed under cross-examination that there is a physical file on the 2020 will but the plaintiffs' advocates did not ask DW3 to produce the physical file in court. Hence, it could not be inferred that the defendants were withholding the said physical file, and an adverse inference should not be drawn against the defendants for not producing the physical file. See *Public Bank Bhd v. Fung Shaw Yiew & Ors And Another Appeal* [2024] 2 CLJ 43. If the plaintiffs wishes to see or peruse the physical file, the plaintiffs' advocates should have asked DW3 to produce it in court during cross examination or subpoena Amanah Raya Berhad to produce the same, but the plaintiffs did not do so.

**[64]** The plaintiffs also urged the court to draw an adverse inference for the non calling of Puan Rabiah of Amanah Raya, the officer in charge of preparing the 2020 will as a witness. The evidence before the court shows that Puan Rabiah is no longer working for Amanah Raya and could not be

contacted by the defendants. As alluded earlier, the plaintiffs should have joined Amanah Raya as a party to this action so that all interested parties are before the court but they did not do so. As the defendants did not withhold the evidence of Puan Rabiah from the court, it would be inappropriate for the court to draw an adverse inference against the defendants for not calling Puan Rabiah as a witness. See *Public Bank Bhd v. Fung Shaw Yiew* above. In any event, the plaintiffs did not dispute that the 2020 will was prepared by Amanah Raya Berhad.

**[65]** I have considered all the other points and issues raised by the parties in their submissions and I respectfully opine that it has not persuaded me to change my findings above.

**Conclusion**

**[66]** From the totality of the evidence adduced in court and having considered the submissions of both parties, the court finds that the plaintiffs have failed to prove their case on a balance of probabilities. The plaintiffs have failed to show any good cause to revoke the letter of probate. The court finds that the 2020 will is valid and is the last will of the testator. In the premises, the letter of probate is valid.

**[67]** Based on the aforesaid reasons, the plaintiffs' claim is dismissed. As the parties are the family members and next of kin of the testator, the court makes no order as to costs.